IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF FOR ALCOA STEAMSHIP COMPANY, INC., PETITIONER

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. p. 30) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. p. 40) is not yet reported.

Jurisdiction

The Judgment of the Court of Appeals was entered on June 29, 1949 (R. p. 46). The petition for a writ of certiorari was filed in this Court on August 16, 1949. Jurisdiction was invoked under 28 U. S. C. 1254 (1). Certiorari was granted by this Court on October 10, 1949.

Statement of Facts

The legal question presented involves the interpretation of the provisions of the "government bill of lading" and of the carrier's (Alcoa's) bill of lading. There are no disputed questions of fact. The disputed issue is whether on the undisputed facts the United States properly paid petitioner, Alcoa Steamship Company, $3,520.52 for full ocean freight to destination on government cargo which was lost when petitioner's vessel, the *SS. Gunvor*, was torpedoed by a German submarine and sunk or whether the Comptroller General properly deducted that sum from an amount admittedly due the petitioner on other freight transactions.

The facts are briefly these:

On or before June 13, 1942, the War Department shipped a government cargo of lumber from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's *SS. Gunvor* (R. pp. 25, 29). On June 14th, 1942, while on her voyage with this cargo aboard, the *Gunvor* was lost by enemy action (R. p. 29). A claim for payment of freight on the lost government cargo was presented by the petitioner and on or about September 15, 1942 the War Department made payment of petitioner's claim in the amount of $3,520.52 (R. p. 29). Upon audit of the account the Comptroller General of the United States excepted to the payment of that sum, and on July 24, 1944, the standard form, referring to the amount as an "overpayment" and advising that "a deduction will be made from an amount otherwise due your company", unless refunded within sixty days, was sent to the petitioner (R. p. 29). On February 2, 1946, refund not having been made, collection was effected by deduction (R. p. 29).

The statement of the Comptroller General as to this deduction was as follows:

> "The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states 'SS. Gunvor has been lost due to enemy action'." (R. p. 65)

The more pertinent parts of the "government bill of lading" Standard Form No. 1058, approved by the Comptroller General of the United States August 28, 1924, are as follows (R. pp. 25-27):

"GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

* * * * *

"5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof. * * *"

"INSTRUCTIONS

* * * * *

"2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

"6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. * * *"

The form of "Consignee's certificate" referred to in Instruction No. 2 provides as follows (R. 27):

"CONSIGNEE'S CERTIFICATE OF DELIVERY

"I have this day received from .....
..... (name of transportation company) at ..... (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good

order and condition, except as noted on the reverse hereof. Delivery service at destination was/was not by the Government.

Weight ..... pounds. .....
(in words) (in figures)

....
(Consignee) (Date)"

This certificate of delivery was endorsed "*SS. 'Gunvor'* has been lost due to enemy action" and signed "For the Acting District Engineer (signature illegible), Superintendent, August 8, 1942" (Ex. 11, R. p. 72A).

The usual form of bill of lading then in use by the petitioner contained the following provision as to freight:

> "6. Full freight to destination whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost * * *" (R. p. 69).

Specification of Errors

The Court below erred:

1. In reversing the decree of the District Court;

2. In dismissing the complaint of the petitioner:

3. In failing to hold that the commercial bill of lading used by the petitioner, providing for the payment of freight whether or not the vessel was lost, should prevail, because such provision was incorporated in the government bill of lading and the government bill of lading did not specifically provide otherwise.

ARGUMENT

The petitioner, upon whose ship a government cargo was carried on a government bill of lading is entitled to recover freight money from the government when its vessel with its cargo was lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost".

I

Preliminary Guiding Tests

(a)

The basic guide in this case is that unless otherwise specifically provided or otherwise stated in the government bill of lading the company bill of lading must prevail.

Under the Carrier's bill of lading (Article 6 quoted on page 5 hereof, also Petitioner's Exhibit 10, R. p. 69) if that only were involved, there would be of course no doubt that recovery would be permitted to the petitioner.

Now the government bill of lading provides, among other conditions, the following:

> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject

to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier" (Petitioner's Exhibit 9, R. p. 68B).

The question is whether it is "otherwise *specifically* provided or otherwise stated" on the government bill of lading.

The trial court stated the issue concisely (R. p. 30):

> "If there is nothing in the government's bill of lading, *specifically* providing to the contrary, i.e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of $3,520.52 was improperly deducted by the Comptroller General." (Emphasis supplied.)

The dissenting opinion of A. N. Hand, C. J., reiterated the issue (R. p. 44):

The provision for the payment of freight whether or not the vessel was lost "now general in commercial bills of lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading prepared by the government and therefore to be construed against it in resolving any ambiguities, '*specifically*' have provided otherwise." (Emphasis supplied.)

What does "specifically" mean?

It means with exactness and precision! (Webster International).

It means in a specific manner; with specific mention; explicitly; definitely; particularly! (New Century Dictionary).

It certainly does not mean by inference, by assumption, by supposition, by surmise, by indirection.

When by the government bill of lading it was desired to avoid a short statute of limitations contained in the carrier's bill it "specifically" said so. Condition 7 of the government bill states:

> "7. In case of loss * * * in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or to period within which claim therefor shall be made or suit instituted" (Ex. 9; R. p. 8B).

When by the government bill of lading it was desired to avoid prepayment of freight permitted under the carrier's bill, it "*specifically*" said so! Condition 1 of the government bill states:

> "1. Prepayment of charges shall in no case be demanded by the carrier * * *" (Ex. 9).

Is there any reasonable ground to believe that the government bill of lading would be any less specific if it was desired to avoid payment of freight when the cargo was not delivered? As the trial judge says:

> "* * * it (the government) could have done so in a single sentence providing that no freight shall be payable if the shipment is lost" (R. p. 33).

On the contrary not only was such provision *not specifically made* but *it was specifically omitted.*

Again as the trial judge says:

> "In construing the provisions of the bills of lading in relation to the shipment on the SS. Gunvor we may take judicial notice of the fact that in June, 1942 there was real danger of loss of vessel in the Caribbean due to the activity of enemy submarines.

> The bill of lading of the carrier contained a war clause (par. 30) to the effect that 'this shipment is at the sole risk of the owners thereof, of all risks of war' including 'sinking by exploding mines, torpedoes, or otherwise'. The government needed the lumber shipped on the SS. Gunvor in the construction of war bases at Trinidad. The carrier was willing to undertake the carriage in an area of war activity. If the carrier was to be deprived of its rights under the clause that freight was payable 'Goods or vessel lost or not lost', that should have been clearly and specifically stamped thereon or stated in the government's printed bill of lading, as it did in paragraph 7 of the printed conditions of the government's bill of lading" (R. p. 34).

(b)

Clauses in the bill of lading prepared by the government are to be construed against it in resolving any ambiguities.

The "government bill of lading" involved in this cause is "Standard Form No. 1058, approved by the Comptroller General of the United States, August 28, 1924" (Ex. 9, R. p. 68A).

The petitioner had nothing to do with the preparation and wording of this document. Like all carriers it had no choice in the use of the government bill.

We do not think that any ambiguities are involved but if there be such then in the words of the dissenting judge in the court below:

> "The company bill of lading should prevail unless clauses in the bill of lading prepared by the government and therefore to be construed against it in resolving any ambiguities, 'specifically' have provided otherwise" (R. p. 44).

(c)

The Solicitor General's employment of the general maritime rule that freight is not earned until delivery of goods to proper person at destination to buttress his argument and to ask impliedly a shifting of the burden of proof in the interpretation of the documents involved, is unsound.

To require that ambiguities, if they exist, in the government bill of lading, a document prepared by the government, are to be resolved against the petitioner, is contrary to established principle.

As the dissenting opinion in the court below states:

> "I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary" (R. p. 44).

The issue in this cause still remains as stated by him:

> "The company bill of lading should prevail unless clauses in the company bill of lading prepared by the government, and therefore to be construed against it in resolving any ambiguities, 'specifically' have provided otherwise" (R. p. 44).

II

There are no inconsistencies between the "conditions" and "instructions" of the government bill of lading and "clause 6" of the petitioner's bill of lading. There is no specific provision nor any statement contained in the government bill of lading which runs counter to "clause 6" of petitioner's bill of lading in so far as it provided that freight was earned "Goods or Vessel lost or not lost".

The government has contended that Paragraph "1" of the "Conditions" and Paragraph "2" of the "Instructions" of the government bill of lading are so clearly inconsistent with the provisions of clause "6" of the petitioner's bill of lading as to bar the carrier (petitioner) from any claim for freight on a shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the petitioner's vessel by act of the public enemy.

There is no inconsistency. Referring to paragraph No. 1 of the Government form of bill of lading, prepayment of charges has not been demanded by the carrier nor has the petitioner sought to make collection from the consignee.

The second sentence of paragraph 1 of the "conditions" provides that payment will be made to the last carrier (unless otherwise specifically stipulated) on presentation to the proper office of the bill of lading "properly accomplished", attached to freight voucher prepared on the authorized Government form.

The only question which requires consideration, therefore, is whether the bill of lading was "properly accom-

plished" in view of the fact that the ship carrying the goods was sunk by enemy action before reaching destination.

There is no suggestion of any improper act or fault on the part of the petitioner. The case is purely one of loss by the act of the public enemy, for which the petitioner is not liable or responsible by the terms of the bill of lading; indeed, there would be no liability or responsibility in such a case even in the absence of the bill of lading clauses. *Hutchinson on Carriers,* 3rd Edition, §314.

The Government bill of lading does not state that the goods must be delivered at destination in order to entitle the carrier to freight. It states merely that the bill of lading must be "properly accomplished" and if the ship and goods are destroyed by the public enemy prior to the time of delivery, a possibility foreseen and provided for in the carrier's bill of lading form, then the Government bill of lading has been within the language of paragraph No. 1 "properly acomplished." In would seem that the language of the government bill of lading has been chosen with some care so as not to impose, in a proper case, the requirement of delivery upon the carrier.

Examination of the government bill of lading shows that the clause upon which the Comptroller General depends had to do with the *method* of payment and has no relation to nor has it to do with terms of the carrier's bill of lading which are incorporated. As the court below said these provisions "have to do with the 'evidence' which must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made."

Condition "1" of the Government bill of lading states:

> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, *payment will be made* to the last carrier, unless otherwise specifically stipulated." (Emphasis supplied.)

Clearly this language outlines the normal procedure for obtaining payment by the carrier.

That "accomplished" means the surrender of the bill of lading and nothing else appears by reference to Instruction 6 set forth on the same page of the government bill, which reads as follows:

> "6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be *before its accomplishment.* * * * Should the loss or damage not be discovered until after the *bill of lading* or certificate *has been* accomplished * * *".

There is no requirement in the government form bill of lading unconditionally requiring delivery at the named or any other "destination". "Accomplished" is a term of art that must be construed in its usual commercial sense and in common maritime usage. "Accomplishment" of a bill of lading merely means the surrender to the carrier by the consignee or other authorized holder upon the completion of the transaction. In such circumstances the original bill of lading is considered "accomplished", and the effect of such "accomplishment" is that any duplicate original

stands void. *Carver on Carriage of Goods by Sea* (8th Ed.), Sec. 502. That is the sense in which the word "accomplished" is used in the case of a bill of lading. The term is an ancient one; the early bills of lading customarily stated: "In Witness Whereof, the Master or Agent of said vessel hath affirmed to 4 Bills of Lading, all of this tenor and date, one of which being accomplished, the others stand void." It does not mean, nor is it conditioned upon, the accomplishment or completion of the voyage as originally intended, although the Comptroller General appears to have understood that it does.

Neither Clause 1 nor Clause 2 of Condition "1" of the government form bill of lading requires "accomplishment" at destination, nor do these clauses require carriage to the originally intended destination as a condition precedent to payment of freight. The government bill of lading is against "demand" by the carrier for "prepayment of charges" and against "collection" from the consignee (Clause 1). "Collection" is conditioned on "presentation to the office indicated * * * of this bill of lading, properly accomplished, attached to a freight voucher * * *". Collection after discharge of the cargo thus should only require presentation of the "properly accomplished" (i.e., endorsed and surrendered) bill of lading and the requisite voucher to the office indicated.

The second condition of the government bill of lading provides:

> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided by the carrier."

Paragraph 6 of the carrier's bill of lading, thus incorporated, provides as follows:

> "Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost."

There is nothing in the government bill of lading "otherwise *specifically* provided or stated."

Prepayment of freight cannot be demanded but full freight "shall be deemed fully earned * * * Goods or Vessel lost or not lost." Certainly there is nothing in the government bill which contravenes this provision of the carrier's bill.

Even in the sense in which the Comptroller General seeks to interpret "properly accomplished" (which we have shown to be erroneous), the carriage of the goods involved *was properly accomplished within the terms and conditions of the carrier's bill of lading.* The goods were lost through "act of war; act of public enemies" for which the carrier was exonerated. So far as the carrier was concerned,—its duties and obligations to perform,—it had met all such obligations, it had properly "accomplished"

(even as construed by the Comptroller General) all its duties in the premises.

In Vol. 24, Decisions of the Comptroller of the Treasury, page 707, the Comptroller of the Treasury rendered an opinion to the Secretary of the Navy under date of May 27, 1918, that payment of ocean freight charges would be due although the vessel carrying the goods was sunk.

The opinion refers to prior correspondence in which the Director of Operations of the United States Shipping Board Emergency Fleet Corporation had advised the Navy Department that rates of freight were established on the understanding that all freight was prepaid and that, if payment could not be made without waiting for accomplished bills of lading at the port of discharge, the freight would have to be insured and the cost of the insurance added to the ocean freight rate. The opinion of the Comptroller then quotes a letter of Cosmopolitan Shipping Co., Inc. to the Navy Department as follows (p. 708):

> "'In connection with these bills, we understood over the telephone this afternoon that you could not make payment until accomplished bills of lading are returned to you by the consignee. If this is correct we would thank you to advise us what the effect would be in case the vessel is lost and the cargo not delivered, also what would be the effect if the cargo is delivered and the bills of lading are lost in the mail en route from Europe to the United States.'"

After referring to the fact that ordinarily payment of transportation charges was to be made only on proof of delivery to the consignee at destination, the opinion of the Comptroller concludes (p. 709):

> "But in the case now under consideration the transportation company may be relieved of loss or

damage under certain conditions, under which the loss would fall upon the Government because of its policy of not insuring its property, whether stationary or in transit. The freight is likewise not insured by the Government.

"*The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to the destination or lost with the destruction of the vessel.*

"Section 3648, Revised Statutes, prohibits payment in excess of the service rendered. Under the circumstances outlined in the case the service required to be performed and for which payment may be made is the delivery of the property to the consignee *or an excusable failure to make such delivery,* evidence of one or the other of which should be furnished." (Emphasis supplied.)

The above opinion was approved in an opinion of the Comptroller General of April 7, 1942, Vol. 21, Comp. Gen. 909.

In the opinion of April 7, 1942, *supra,* addressed to the Secretary of the Navy, the Comptroller General authorized payment of freight on shipments destined to the Philippines or Guam if a satisfactory showing could be made of facts or circumstances reasonably establishing the carrier's inability by reason of war to effect delivery. This opinion reads, in part (p. 913):

"In any event, it would appear that where the carrier claims charges without showing delivery of the shipment it reasonably may be required to show what particular facts or circumstances it relies upon as relieving it from the duty to effect delivery and obtain receipt from the consignee, and to certify that so far as known the shipment would have been delivered but for such facts and circumstances. See decision of May 27, 1918, 24 Comp. Dec. 707."

It is obvious that had the *SS. Gunvor* not been destroyed by German naval action, the shipments would have been delivered at destination. The decision of the Comptroller General just referred to shows that a signature by the consignee showing receipt of the goods is not of the essence where acts of war make delivery impossible.

In a letter dated May 11, 1944, addressed by the Comptroller General of the United States to the Administrator, War Shipping Administration, certain procedure proposed by the War Shipping Administration is approved. The Comptroller General wrote:

> "In prescribing the use of the War Shiplading 7/1/42 for ocean shipment by office letter of August 31, 1943, A24222, full consideration was given to the commercial maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost."

After quoting paragraph 15 of the "War Shiplading" which resembles paragraph 6 of plaintiff's bill of lading above quoted, the Comptroller General continued:

> "Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers generally cover the transportation charges by insurance and as it has

been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions."

The legal rule that freight may be earned although the goods are never delivered is well established. In *Allanwilde Transport Corp.* v. *Vacuum Oil Company*, 248 U. S. 377, the Supreme Court said, in upholding a contract that freight was to be considered earned, vessel lost or not lost (p. 385):

> "There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation."

Other Supreme Court decisions further supporting the conclusions reached in the *Allanwilde* case include:

International Paper Co. v. *The Gracie D. Chambers*, 248 U. S. 387;

Standard Varnish Works v. *The Bris*, 248 U. S. 392.

In *The Quarrington Court*, 122 F. (2d) 266, 268 (C.C.A. 2, 1941), the Court said:

> "The provision that freight was payable on destination does not override the provision that it is to be paid regardless of the loss of the ship."

See, too, *Portland Flouring Mills* v. *British & For. Mar. Inc. Co.*, 130 Fed. 860 (C.C.A. 9).

III

The errors of the opinion of the Court below in reaching the conclusion that the government bill of lading specifically overrode the provision of the carrier's bill of lading.

1. We consider unfounded the conclusion of the Court below that there is an inconsistency between the provision of the carrier's bill of lading that freight should be deemed earned on shipment and the provision of the Government bill of lading against collection of freight in advance or from the consignee. This conclusion is based not on any verbal inconsistency between the two provisions, but *wholly on the Court's assumption that there is no reasonable ground upon which to reconcile the two provisions.*

The Court suggests that there is "no reason why the United States * * * should wish to defer the payment of a claim which it must inevitably pay at some time".

In fact, an excellent reason is quite apparent to any one familiar with the cumbersome routine and delays inherent in the Government's own disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation by the carier and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is obvious that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Thus a very practical and important effect can be given to Condition 1 of the Government bill of lading, without importing into its language any inconsistency whatever with the customary commercial stipulation in the carrier's bill of lading that the freight should be deemed earned on shipment. The latter stipulation affects merely the risk of loss, a subject on which the Government bill is entirely silent.

The Court's construction would do violence to the express purpose of Condition 2 of the Government bill, to make commercial terms govern the shipment unless they are "specifically" excluded by provisions or statements in the Government bill.

2. The Court below asserts that the Government bill of lading in that it states no "collection shall be made from the consignee", thus deprived the carrier of its ancient lien for freight. (As a matter of fact the company's bill of lading provided for its lien for freight and at most the Government bill of lading only "specifically" provided against such lien.)

The dissenting opinion of A. N. Hand, C. J. clearly shows the irrelevancy of this assertion:

> "The agreement that freight charges were to be paid only after delivery in cases where the voyage had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor." (R. p. 45)

3. The Court below has come to the conclusion that "Condition" Number 1 of the Government bill of lading, read with the second "Instruction", "together constitute a carefully devised plan by which the United States, * * * asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get * * *."

The Court went on to say:

> "Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general." (R. p. 42)

It is respectfully submitted that the Court's conclusion overlooks the importance in the transaction of the well settled commercial practice that freight is earned on shipment, and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments".

The Court quite correctly found that it is a well settled custom or practice for carriers to stipulate, as did the carrier in this case, that freight shall be deemed earned on shipment and thus to shift to the shipper the risk of loss of the benefit of its freight payment if delivery of its

cargo at destination should be prevented by causes for which the carrier is not liable.

The Court suggests that such customary shifting of the risk may have come about "Because of the carrier's superior bargaining position".

It is respectfully suggested that no basis has been shown for such a suggestion, but even if such were the true explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there was such a well established or general practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers, respectively, had been adjusted on the basis of the existence of that practice at the time the shipment of appellant's lumber was made.

It is now too late for the carrier to protect itself by insurance against the risk of loss of its freight which the Court's present opinion would place upon the carrier contrary to well established commercial practices.

Furthermore the carrier in this case carried this shipment at the same rate as was charged for commercial shipments under its regular bills of lading making the freight earned upon shipment. Thus the carrier would be deprived both of the opportunity to insure itself against the risk of loss of freight but also of the opportunity to require additional compensation for this unusual assumption of risk.

It is submitted that, having in mind the express provisions of the Government bill of lading incorporating commercial rules and conditions, a court should be most reluctant, yes, refuse to reach a result so at variance with customary practices, especially when, as in this case, the terms of the Government bill of lading do not expressly

require that result, when there is nothing unreasonable in the commercial practice and when to disregard it would result in a discrimination between shippers.

4. There is nothing inconsistent in the terms of the Government bill of lading with the "freight earned on shipment" clause in the carrier's bill of lading, neither is that clause in any way unreasonable. For hundreds of years carriers' bills of lading have customarily provided against the assumption of certain risks, such as loss by peril of the sea, which the law would otherwise impose on them and shippers have customarily insured their goods against such risks. The situation is well understood and the only practical result is that one group of underwriters, rather than another, receive the premium for taking the risk.

Ocean transportation, like any other commercial service, can only be maintained if the charges of the carrier produce revenue sufficient to cover the carrier's expenses and risks and to produce a profit.

Before it became the practice to make freight earned on shipment, one of the risks which the carrier assumed was the risk of loss of his freight revenue from a voyage if he were prevented from delivering the cargo at its destination. Of course, this risk could be and was covered by insurance on freight, the premium for which became part of the carrier's operating expense. In times of war, such insurance would have to include war risk insurance which would involve heavy premiums at a time of great war risk such as 1942. Obviously, however, even if the former practice still prevailed the shippers of goods would have to pay the cost of such insurance as one of the elements going to make up the total transportation charges of the carriers.

The effect of the now established general commercial practice to shift this risk to the owner of the goods does not in any way increase the total cost of transportation, but merely eliminates the premiums on freight insurance as part of the carrier's charges to the shipper and puts them among the shipper's insurance costs. In either case, the cargo owner and eventually the general public pays for the insurance or assumes the risk as part of the overall cost of the goods.

The arrangement does have the advantage of eliminating separate insurance on freight, is convenient to the shipper in the common case of C.I.F. shipments, and it also simplifies the adjustment of losses on voyages where casualties occur, particularly the adjustment of general averages, because the interests in the adventure are reduced from three—(ship, cargo and freight)—to two (ship and cargo).

Moreover, the shipowner does not escape from any obligation which the law may forbid him to escape because if the cargo is lost by a cause not lawfully excepted in the bill of lading, the carrier is liable to the cargo owner for the latter's loss, which includes the loss of the freight.

IV

Answering some anticipated contentions of the respondent.

1. The "Instructions" contained on the back of the "Public Voucher for Transportation of Freight or Express" (Ex. B, R. 74B) form no part of the government bill of lading. They constitute no part of the terms of carriage.

2. We have pointed out what the term "accomplished", really a term of the art, means in dealing with bills of lading. Just as did the Comptroller General so the government in its briefs heretofore filed, confuses the term with "carriage of goods to destination". It is improperly insisting that performance under contract can only be made in one way. The petitioner very properly says it has performed its contract as made and accordingly entitled to payment in accordance with its terms.

V

As to the application and effect of revised statutes 3648 (31 U. S. Code Sec. 529).

In the Court below the government raised the question of the prohibition of advance payments under R. S. 3648. 31 U. S. Code Sec. 529 provided in part as follows:

> "Advances of public moneys; prohibition against. Except as otherwise provided by law, no advance of public money shall be made in any case. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

Concededly the government form bill of lading in its clause 1, prohibits demand by the carrier of prepayment of freight and this conforms to the foregoing statute. However, no request for prepayment is involved here.

The payment made did not exceed the value of the service contracted for. Counsel for government seems to think—at least it has so stated,—that because the

petitioner did not carry the respondent's cargo to the appointed destination the value of the service rendered was "nil". This is not even plausible. "Value" may be fixed by agreement as it was here and cannot be judged by subsequent events. In this case the petitioner's services were valued by the parties at the rates stipulated in the contract, and in arriving at that value (the agreed freight) no exception was made to the clauses protecting the carrier in respect of war risks.

The petitioner's bill of lading, paragraph 30, provided:

> "It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparation for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or otherwise, interference or hostilities on the part of any Power and of all consequence thereof * * *" (Ex. 10, R. p. 70).

In *McClure* v. *United States*, 19 Ct. Claims 173, cited in government's brief, the Court of Claims said:

> "This statute (R. S. 3648) was intended to prevent a department from anticipating the *performance of an agreement*, by keeping the payment within the value of the service, and does not apply when there is a complete performance, although the government may not have received any benefit in consequence of the destruction of the subject matter of the agreement.
>
> "The Claimants were not insurers * * *, and it being * * * without their fault the consequences must not fall on them."

The value of the services performed by the petitioner was stipulated in the contract of carriage, viz., the government bill of lading which was subject to the conditions of the petitioner's commercial form bill of lading. The service was to carry the goods to destination, subject, however, to their loss by acts of war. Under such conditions the freight was necessarily at the risk of one or the other of the parties. By the contractual provisions of the petitioner's bill of lading, a part of the agreement between the parties, the risk of loss fell upon the government, the shipper.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

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